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Case No. 10-550

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2010

STATE OF FLORIDA,

Petitioner

v.

BLAINE ROSS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

(AS FRAMED BY PETITIONER, THE STATE OF FLORIDA)

[Capital Case]

WHETHER THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEDGMENT AND WAIVER, AFFORDS A PRESUMPTION OF ADMISSIBLITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT?

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STATEMENT OF THE CASE

A. Florida Supreme Court's Findings

In its opinion below, the Florida Supreme Court found that "[T]he police, over a period of several hours of custodial interrogation, deliberately delayed administration of [Miranda] warnings, obtained inculpatory admissions, and when the warnings were finally administered midstream, minimized and downplayed the significance of the warnings and continued the prior interrogation - all of which undermined the effectiveness of Miranda"[1] [State's Appendix A2]. Based on the totality of the circumstances, including Detective Waldron's own testimony concerning his consultation with his supervisors prior to the interrogation, the Florida Supreme Court concluded "that rather than merely making a good-faith mistake, the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to obtain the initial statement" [A50, see A8,49-50]. The Florida Supreme Court also concluded that when the Miranda warnings were eventually and belatedly given (after several hours of accusatory interrogation which yielded "multiple inculpatory statements", A2) "under the totality of the cir-

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

cumstances, the waiver of the defendant's rights against self-incrimination was not voluntary, knowing, and intelligent, and the [postwarning] statements were not voluntarily given" [A2,A65]. Regarding the issue of whether psychologically coercive tactics were used to obtain Ross' prewarning and postwarning statements, the Florida Supreme Court wrote:

> ...[T]he danger of police engaging in the type of tactics exhibited in this case is not only that the prophylactic purpose of Miranda is undermined but that the confession itself is unreliable. Dr. DeClue, Ross's false confession expert, explained the factors that increase likelihood of false confessions, many of which were present in Ross's case, such as increasing the pressure, exaggerating evidence, challenging a person's memory, continuing an interrogation for a lengthy amount of time, showing photographs of the crime scene, and using isolation. The very fact that Ross confessed that he might have taken his mother's jewelry when in fact the evidence reveals that Kathleen Ross herself had actually taken the jewelry from her house and placed it in her mother's house highlights this danger. [A64]

Finally, the Florida Supreme Court repeatedly emphasized that its conclusions were based not only on federal constitutional protections but also on the Florida Constitution and on Florida jurisprudence which pre-existed Miranda by over half a century (A2,15,17-18,31,40,65).

B. Facts Pertaining to Whether the Delay in Giving Miranda Warnings was a Deliberate Tactical Decision or an Inadvertent Mistake

Detective Waldron testified in the suppression hearing that he believed that this session would be his last chance to interrogate Blaine Ross. Unlike the earlier sessions (which were audiotaped), the January 9 interview was conducted in a small, windowless second-floor room equipped with a video camera mounted high on the wall. Asked about the decision to change rooms, Waldron said he reasonably assumed he could only interview Blaine one more time before he might ask for an attorney. "So it was determined that this would probably be the only opportunity we might have to question him about the details of the case". Recognizing that "this interview could be key, we wanted to have it audio and video recorded". Waldron acknowledged that under his own sheriff's department's general orders (of which he was aware at the time of the interrogation) he was required to give Blaine Miranda warnings before accusing him of a crime or confronting him with evidence pointing to his guilt. [The defense introduced Manatee County Sheriff's Office General Order #1027, promulgated by Sheriff Charles B. Wells, which specifies that "Constitutional Rights Warnings are required before questioning" when a suspect is arrested or when "[q]uestioning passes from the fact-finding process to an accusatory stage". However, Waldron did not believe that his

interrogation of Blaine was in violation of his own department's orders because "General orders are a guideline to follow, and there are times where, in certain circumstances you have to go outside of those guidelines, and in these particular circumstances, you know, I discussed with my supervisors, was told and even given suggestions of how to proceed, and even the Sheriff himself, when I conducted the last interview, had told me how he thought things should go". Before the January 9th interrogation, Sheriff Wells told Waldron "he was counting on me to get closure on this, and that he trusted my judgment, and wished me luck". Asked by defense counsel whether Sheriff Wells specifically told him to violate the department's general orders, Waldron replied "No, he didn't, but he was there the entire time this took place, and if there was a problem with what I was doing any one of the supervisors could have stepped in and...stopped what I was doing, and that never happened". According to Waldron, Sheriff Wells and many other people were in another room viewing the monitor while the videotaped interrogation was occurring. [See Opinion of Florida Supreme Court, A8, 43-44, and Detective Waldron's suppression hearing testimony at Respondent's Appendix B3-6].

C. Facts Pertaining to the Prewarning Interrogation

During the January 9 interrogation, more than two hours before Miranda warnings were eventually given, Detective Waldron confronted Blaine by asserting that blood tying him to the murder of his parents had been found. [This is the point where the Florida Supreme Court determined the interrogation became custodial. (A28, A68). Even the dissenting Justices agreed that everything which followed was custodial interrogation (A71, n.32). Nor does the state claim otherwise in its petition for certiorari]. Waldron asked, "Blaine were you upset with your mom?" They discussed the impending divorce, and Blaine admitted that he was angry at his dad for cheating. Waldron asked him point-blank if he killed his father; Blaine said "No". Waldron asked him if he killed his mother, and he said "No". Waldron said, "Well, Blaine, I don't believe that. And I'll tell you why. Blood was found on a pair of your pants, that matches the crime scene"[2]. When Blaine persisted in denying that he killed his parents, Waldron said, "Okay, but the blood doesn't lie, the evidence doesn't lie."

For the next five minutes on the videotape, Waldron's voice, manner, and body language are louder, angrier, more belligerent

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[2]Waldron had information at the time that the blood on the pants had tested as human blood, but he had no information indicating that it matched the blood from the crime scene.

and aggressive than when it was gradually building up to this point:

> And I'm telling you right now, you're bringing yourself down, but you're also bringing down a 16-year-old girl and your best friend. Okay? Because they have lied to try to help you out. That blood on those pants that were yours, that were at Erin's house, do not lie. You've brought Erin into this, and you've brought Mikey into this.
>
> You lied to your sister, you've lied to your grandmother, you've lied to your aunt, you've lied to your family. Now is the time to be truthful and be a man about this and tell us what happened and why. Well, we know the what happened, but why. Why, Blaine. Why go to this extent. Why be so upset and angry that you'd do this.
>
> BLAINE: I didn't, and I don't know - -
>
> WALDRON: How did the blood get on your pants?
>
> BLAINE: I don't know of the pants you're speaking of.
>
> WALDRON: A pair of black pants.
>
> BLAINE: A pair of black pants.
>
> WALDRON: And you were seen wearing those black pants on Tuesday.

[In fact, no witness saw Blaine wearing those pants that night. Asked during the suppression hearing if he made that up, Waldron said, "I might have."]

> BLAINE: Okay. Um, well, I do have a pair of black pants, they're like Dickies.
>
> WALDRON: That's right. Those pair of black Dickies have blood on them.
>
> BLAINE: I do not know how it got there.

WALDRON: I know how that blood got there, Blaine. When you brutally, cold-blooded beat your parents to death, when you smashed in their heads and beat them to death.

[When he says "smashed in their heads and beat them to death", Waldron is yelling at Blaine. The rest is said slowly and emphatically, leaning toward Blaine's face].

BLAINE: I - -

WALDRON: And then you took that rope that was in the garage and you put it around your mother's neck, and you put it around your father's neck, and you slowly methodically cold-bloodedly pulled it tighter and tighter and tighter, Blaine. After smashing in their heads. That's how you got that blood on your pants, those black Dickies that you were wearing Tuesday.

BLAINE: No.

WALDRON: Yes, Blaine.

BLAINE: I - -

WALDRON: Blaine - -

BLAINE: I'm - -

WALDRON: Blaine, you can't dispute the blood that's on those Dickies. The lab has already tested it.

BLAINE: Okay.

WALDRON: Okay? There's no other way that blood would have got on there. That blood got on there when you beat your parents to death.

(emphasis supplied.)

Later:

WALDRON: And you brought all your clothes over to Erin's house so that Erin could wash them. And Erin washed all of your clothes Tuesday morning - - I mean Wednesday morning, according to you. But the thing that she forgot

to wash were those black Dickies that had blood on it from killing your parents.

BLAINE: No.

WALDRON: Yes. Yes, Blaine.

BLAINE: I didn't kill my parents.

WALDRON: That's the only way that blood would have gotten on there, Blaine. You weren't wearing those pants in there when you discovered - - when you called 911, so we know the blood didn't get on there that way. But that blood was on there from when you killed your parents. And it's not just one spot, Blaine. The way your parents were killed, that you killed them, was with so much rage, so much anger - -

BLAINE: I - -

WALDRON: And you even told the lady at the bank that your mom was out of town, knowing full well that there was no way the bank could call your house and talk to your mom.

BLAINE: I don't remember telling that lady -

WALDRON: You don't remember much at all, okay? And from what you do supposedly remember, has all been lies, because we've been able to verify it. You drug in Erin. You want to see Erin go to prison now? Mikey go to prison? Is that what you want? You want to bring all these people down with you? For what you did? The time is now to be a man. And the evidence doesn't lie.

[By this time Blaine, in his chair in the corner, is hanging his head down].

BLAINE: I don't know how blood got on those black Dickies. I was not - -

WALDRON: I do know how. There's only one way that blood could have gotten on there.

BLAINE: And I - - I didn't kill my parents. And I'm not trying to bring anybody down with me

[It is now 5:30 p.m. Blaine has still not been advised of his Miranda rights, nor will he be for another two hours].

At this point, Waldron says "Blaine, you are"; his aggressive demeanor subsides and his tone appears compassionate:

> Blaine, is it possible that when this happened, because of how it happened and what happened, that you don't remember? That you're blocking part of this out? Blaine, I know - - help me out here.

Waldron said, "Blaine, I know it's hard", and when Blaine reiterated that he didn't kill his parents Waldron brought out the crime scene photographs again and said, "Blaine, look at these. These are your parents. Is this how you want them to be remembered?". Then, "Tell me the truth. Blaine, I'm going to have to walk out of here and tell your sister what I know...." Waldron shows Blaine the photos again and says, "Is that how you want your sister to remember this?".

Waldron went back to asking Blaine if it was possible he blocked it out and couldn't remember. Blaine made it clear that he was not saying he killed his parents, but there was a possibility, "with the information that I have been given" and in view of his inability to remember the time sequence, "it is a possibility that I could have done this and not remembered". Blaine asked Waldron "[d]oes that make sense?" and Waldron replied, "That does make sense.... Blaine, that is the most sense that you've told me that

you have made out of this". Blaine, almost crying, repeated "I didn't kill my parents".

Waldron said, "But Blaine, you were so upset...maybe you didn't mean to, I'm sure you didn't mean to. I think maybe something snapped that you don't remember, that you had no control over". Blaine asked "Does that happen?", and Waldron assured him it does. Waldron continued in this vein; Blaine is a young kid, he was upset with his dad, things just got to the breaking point, you lose control "and by the time you realize what's happened, you can't go back and change it." Waldron (using what he acknowledged in the suppression hearing is known as the "lifesaver technique") told Blaine, "I'd rather be able to tell your sister that this was all a horrible accident..."

At 5:45 p.m. (more than an hour and a half before Miranda, Blaine said to Waldron, "Can I ask you a favor?" "Sure". "Can we go smoke a cigarette?" Waldron replied, "We can smoke one in here". Blaine said, "Okay. I was going to say we could - - you can handcuff me to yourself to make sure I wasn't gonna run."

[For all of their previous breaks, Blaine and Waldron went downstairs and outside the building. Waldron explained in the suppression hearing, "We were...in a different part of the building" on January 9. However, when they had taken a smoke break an hour and half earlier on January 9 they had gone outside. When Blaine said "You can handcuff me to yourself to make sure I wasn't going

to run", Waldron did not tell him he was free to leave or that he was free to go outside on his own, "because once again he's making a statement, he's not asking a question"].

Waldron moved a trash basket and told Blaine to "[p]ut your ashes in here". For the remainder of the interview, when he smoked, he used that receptacle or a paper or plastic cup.

Blaine said to Waldron, "you could be right, and that's what I'm scared of." Waldron said, "Well, Blaine, I don't think it's a matter of I think you're right, I think it's pretty much what happened". "Sometimes traumatic things happen, and we tend to block those things." Blaine, his voice breaking, said, "I'm scared". Waldron asked him if he washed up in his parents' bathroom afterwards, or if he went someplace else and washed up, "[b]ecause I think if you had gone back to Erin's house and washed up it would be pretty obvious." He asked Blaine if he changed his T-shirt or if he gave Erin the baseball bat. Blaine said, "You're making me question myself". Blaine again reiterated "I didn't do this", but - - as a hypothetical situation - - he didn't remember cleaning up or changing clothes or getting rid of a bat. Waldron asked him if he remembered being mad and upset at his dad, and Blaine answered that he did. Waldron said, "It was just getting to the point where you exploded. I don't think you intended to hurt your mother".

When Blaine repeated, "I don't think I did this", Waldron got him to acknowledge (again) that it was possible. Waldron then as-

serted that it was more than just a possibility because of the blood on his pants, which put him at the crime scene. "Blaine, the only way you can put an end to this and to start making things right is to tell me what you remember about that".

BLAINE: I didn't go back there.

WALDRON: But Blaine, you did.

*** ***

BLAINE: I don't know, I don't know. I don't remember going back to my parents' house. I don't think I did. But you say you have a pair of my pants with blood on them, and that makes me question myself. Because I don't remember, I don't remember doing this, if I did it. And now I'm scared.

Later:

BLAINE: You made me dig inside and think about it, and you've also given me hard evidence that puts me at the crime. And - - I can't - - I can't - - I can't - - I can't remember if I did this or not. I don't know. I mean, you have solid evidence, blood on my pants and everything, and I don't remember doing this, if I did it. And you're right, I did foul things up, and I have exploded before, and I - - that story that I told you about punching the wall, I don't remember doing that, but when we came home it was there. And I had gone inside, and I - - (unintelligible) - - like my mom said. I'm pretty sure my sister will remember it too, I don't know.

WALDRON: This time something very similar happened, didn't it.

BLAINE: I don't know. Because I don't remember punching the wall, and that's the only thing that I can compare this to, is not remembering what I did whenever I was mad, when I was upset. I think - - this is the scary part, now I think that I did do it.

WALDRON: The evidence doesn't lie, Blaine.

BLAINE: I don't remember.

WALDRON: I know you didn't mean to.

BLAINE: If I did, I didn't mean to.

WALDRON: I know you didn't mean to.

(emphasis supplied)

The pre-warning interrogation continued in the same vein for another hour and a quarter, interspersed with a brief visit Ross was allowed to have with his sister. [As the Florida Supreme Court noted, Ross was not permitted to talk to her outside the interrogation room; she was brought in to him, A25].

D. Facts Pertaining to the Midstream Miranda Warning

At about 7:20 p.m. Waldron said to Blaine in an offhand manner:

> There's a couple of things that I need to go over with you real quick. There's a couple of things I discovered, and before we go any further I want to cover this with you, it's just a matter of procedure, um, based on everything we're talking about.

(emphasis supplied)(see Florida Supreme Court's opinion, A2, 53, 57-58).

Blaine asked if he was being arrested, and Waldron replied, "Nope. At this time you and I are talking, okay? And I would like to talk to you some more. But before I do, I need to go over

this". Waldron then - - for the first time - - read Blaine his Miranda rights; including "[y]ou have the right to remain silent" and "[y]ou can decide at any time to exercise these rights and not answer any questions or make any statements". Asked if, having these rights in mind, he wished to talk with the detective now, Blaine hesitated, and then said:

> I want - - I'd really like to talk to my sister, and since she's not here - -
>
> WALDRON: We tried to get in touch with her to get her back here.
>
> BLAINE: I don't know what I'm going to do. I don't know what's going to happen, and - -
>
> WALDRON: Well, I'm willing to talk to you if you want. We're trying to get in touch with your sister now so - - you're indicating that you do want to talk to me; correct?[3]
>
> BLAINE: Yes.
>
> WALDRON: Okay, if you would, please sign right there.

Shortly after Blaine signed the waiver form, Waldron expressed empathy; as human beings we all make mistakes, lose our tempers, hurt people we don't mean to. "But I do know what the evidence is that we have, and that evidence tells a story, and it's a story that cannot be changed or made up or misconstrued or

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[3]At trial, Waldron was asked about his statement that he was trying to find Blaine's sister. She was no longer with the victim advocate, and "To the best of my knowledge she was not in the building. I don't know what efforts were made, if any. I personally wasn't making any efforts."

misunderstood". Blaine (appearing to be crying, hands over his eyes) said in a very weak voice, "Well, I told you - - you - - you're right, about a lot of things. I, I, I don't think I did this. I don't know...." Waldron replied, "I know you say you don't think you did this, but there's the blood on your pants. This wasn't a burglary, somebody who broke into that house".

After fourteen seconds of silence, Blaine - - while shaking his head negatively from side to side at least 10-12 times, and in a broken voice - - said to Waldron, "I don't think I can help you any more. I don't think I have anything else to say." After another pause, Waldron said "Gotta make this right, Blaine." [See opinion of Florida Supreme Court, A56-57 and n.27, considering Ross' statement and Waldron's response "as part of the totality of the circumstances as to whether Ross' [Miranda] waiver was voluntary, knowing and intelligent"]. The interrogation continued apace.

E. Continuity of Prewarning and Postwarning Interrogation, and Absence of Curative Measures

When Ross was belatedly Mirandized, no curative measures were taken. As stated by the Florida Supreme Court:

> ...[R]ather than informing Ross that his prior admissions could not be used against him, Detective Waldron did the opposite, reminding Ross about everything that happened that day and that there were "a lot of things that [Ross] admitted to now." Detective Waldron continued his prior questioning without any break from

> the prewarning interrogation, playing on the same themes and using the same tactics as earlier. Based on the tactics used and the fact that Detective Waldron reminded Ross about his admissions immediately after providing him with his Miranda warnings, Ross would likely have had the misimpression that his prior incriminating statements could be used against him.

(A59;see A52-53,55-56,60,63-64).

The Florida Supreme Court also found that there was no meaningful break between the pre-warning and post-warning interrogation; the whole thing was conducted by Detective Waldron in the same small room which Ross was never allowed to leave. The questioning was treated as continuous, the content overlapped, and Waldron repeatedly reminded Ross of his prior admissions (see A10,55-56,59,62-65). For example, shortly after the Miranda warnings were read:

> ...the interview turned back to their prior discussion. Detective Waldron reminded Ross of his prior statements as follows:
>
> > Like I was saying before, earlier, there's a lot of things that happened today, and there's a lot of things that have come at you, and a lot of things that you've admitted to now, that you've kept bottled up inside before, hidden, that you're now having to deal with. I know this is very difficult. I do know that you loved your parents.

[Emphasis in Florida Supreme Court opinion].

> Detective Waldron continued his prior line of questioning that was established before the warnings without any break in the interrogation. He asked many of the same or similar questions. He played on the same themes and employed many of the same techniques...

(A55-56)

F. Florida Supreme Court's Finding that Ross' Miranda Waiver and Ensuing Confession Were Involuntary

The Florida Supreme Court found not only that Detective Waldron pursued a deliberate two-step strategy to circumvent Miranda [A2,50], but also - - due to the various improper tactics used - - that Ross' waiver of his Miranda rights and his ensuing confession were involuntary [A2,65]. Discussing the state Constitution and jurisprudence, the Florida Supreme Court wrote:

> Both the United States and Florida Constitutions provide that persons shall not be "compelled" to be witnesses against themselves in any criminal matter. U.S. Const. amend. V; art. I, § 9, Fla. Const; see also Traylor v. State, 596 So.2d 957, 964 (Fla. 1992) (stressing that under the basic contours of Florida's constitutional privilege against self-incrimination, "a main focus of Florida confession law has always been on guarding against one thing-coercion"). Based on these federal and state constitutional guarantees, if a defendant confesses during a custodial interrogation, in order for the confession "to be admissible in a criminal trial, the State must prove that the confession was not compelled, but was voluntarily made." Ramirez v. State, 739 So.2d 568,573 (Fla. 1999).
>
> (A15)
>
> *** ***
>
> As this Court has recognized, "[t]he protections enunciated in Miranda have been part of this State's jurisprudence for over a century pursuant to the Florida Constitution." Ramirez, 739 So.2d at 573; see also

Traylor, 596 So.2d at 964-66. Traylor explains the contours of our state constitutional law:

> The basic contours of Florida confession law were defined by this Court long ago under our common law. We recognized the important role that confessions play in the crime-solving process and the great benefit they provide; however, because of the tremendous weight accorded confessions by our courts and the significant potential for compulsion-both psychological and physical-in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing-coercion.... The test thus is one of voluntariness, or free will, which is to be determined by an examination of the totality of the circumstances surrounding the confession.

(A17-18)

In assessing the totality of the circumstances in Ross' case, the Florida Supreme Court observed:

> As we explained, the danger of police engaging in the type of tactics exhibited in this case is not only that the prophylactic purpose of Miranda is undermined but that the confession itself is unreliable. Dr. DeClue, Ross's false confession expert, explained the factors that increase likelihood of false confessions, many of which were present in Ross's case, such as increasing the pressure, exaggerating evidence, challenging a person's memory, continuing an interrogation for a lengthy amount of time, showing photographs of the crime scene, and using isolation.

(A64).

The Court also noted that Ross "was only twenty-one at the time with no indication of any prior experience with the criminal justice system" (A64).

The Florida Supreme Court held that the state failed to meet its burden of proving that Ross voluntarily, knowingly, and intelligently waived his Miranda rights, or that his ensuing statements were voluntarily given (A65):

> When the Miranda warnings are purposely delayed after hours of custodial interrogation, when Miranda warnings are given in such a way as to minimize and downplay their significance, and when the postwarning interrogation is treated as a continuation of the prewarning interrogation, the risk is that the suspect will not understand the rights and the consequences of waiving the rights. The risk is that the very purpose of Miranda is undermined and that the warnings will not function effectively as Miranda requires.

(A65).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Contrary to Petitioner's main assertion, the Florida Supreme Court did not "conflagrate" (cert. petition p.13)[4] or "improperly commingle" (p.15,19,23) the relevant factors from Missouri v. Seibert, 542 U.S. 600 (2004)(plurality opinion); Seibert, 542 U.S. at 618-22 (Kennedy, J., concurring); and Oregon v. Elstad, 470 U.S. 298 (1985). Instead, the Florida Supreme Court's findings as to (1) the deliberate strategy undertaken by

[4] Petitioner probably means "conflate", since the Florida Supreme Court did not set Seibert and Elstad on fire.

Detective Waldron and his supervisors to circumvent Miranda; (2) the hours of confrontational accusatory interrogation without Miranda warnings which produced multiple inculpatory admissions; (3) the psychologically coercive techniques used; (4) the absence of any curative measures when the warnings were belatedly given; (5) Waldron's minimizing and downplaying of the Miranda warnings; (6) the continuity of the prewarning and postwarning interrogation (including Waldron's repeated reminders to Ross of what he'd already admitted to); and (7) the involuntariness under the totality of the circumstances of Ross' waiver of his Miranda rights and his ensuing postwarning statements make it clear that the Florida Supreme Court correctly determined that Ross' statements were inadmissible under any standard; Seibert (plurality), Seibert (Justice Kennedy's concurrence), Elstad, as well as Florida constitutional and decisional law.

Since Detective Waldron's interrogation of Ross fails to meet any constitutional standard, this is not a case in which to decide which of the standards he violated is controlling.

I.

WHETHER THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEGMENT AND WAIVER, AFFORDS A PRESUMPTION OF ADMISSIBLITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT.

[AS FRAMED BY PETITIONER, THE STATE OF FLORIDA].

The Question Presented for Review, as framed by the State of Florida, is inaccurate at best, deceptive at worst. The findings of the Florida Supreme Court on the mixed questions of law and fact - - and the evidence (including Detective Waldron's own acknowledgments [see Respondent's Appendix B, p.3-6]), introduced during the six-day suppression hearing preceding this capital trial - - overwhelmingly show that Ross' multiple pre-warning and postwarning inculpatory admissions were the product of (1) a deliberate two-step strategy undertaken by Detective Waldron, with the express or tacit approval of his supervisors, to circumvent 21 year old Blaine Ross' Miranda rights, because they believed it would be their last chance to interrogate him before he might ask for a lawyer; (2) several hours of alternately heated and fake-sympathetic accusatory interrogation; and (3) psychologically coercive tactics likely to produce a false

confession. The evidence -- and the state Supreme Court's findings -- are replete with instances of police misconduct and coercive techniques. As for the (eventual) "provision of complete and accurate Miranda warnings" referred to in Florida's "Question Presented", Detective Waldron may indeed have read all the words, but petitioner omits the crucial facts (under Justice Kennedy's concurring opinion, as well as the plurality opinion in Missouri v. Seibert, 542 U.S. 600 (2004)) that (1) no curative measures were taken to advise Ross that his prewarning statements could not be used against him; (2) to the contrary, Waldron repeatedly reminded Ross of his prewarning admissions and asked him to expand on them; (3) Waldron downplayed and minimized the Miranda warnings, telling Ross they were "just a matter of procedure...based on everything we're talking about"; and (4) when Ross said to Waldron "I don't think I can help you anymore. I don't think I have anything else to say", Waldron (going further than Davis v. United States, 512 U.S. 452 (1994) permits, assuming arguendo that Ross' attempt to stop the interrogation could be called equivocal) replied "Gotta make this right, Blaine", effectively communicating to Ross that he had no choice but the continue. [See A56-57 and n.27].

The Florida Supreme Court did not confuse or improperly commingle the Seibert and Elstad opinions. The relevant factors to consider do overlap to a considerable extent (see A41 n.10).

The Florida Supreme Court was not unaware that there are differing views as to whether the Seibert plurality opinion or Justice Kennedy's concurring opinion is controlling (A37-38 n.9). As Ross stated in his brief:

> While some appellate courts have found or suggested that the plurality opinion in Seibert is the controlling or more persuasive authority [see State v. Pye, 653 S.E.2d 450,453 n.6 (Ga. 2007); Martinez v. State, 204 S.W. 914,918-20 (Tex. App. 2006); Crawford v. State, 100 P.3d 440,450 (Alaska App. 2004); State v. Farris, 849 N.E.2d 985,994 (Ohio 2006); United States v. Carrizales-Toledo, 454 F.3d 1142,1151 (10th Cir. 2006)], Florida courts - - in accord with the majority of federal circuits - - have concluded that the narrower concurring opinion of Justice Kennedy is the controlling authority. Davis v. State, 2008 WL 2277520 (Fla. 2008); State v. Pitts, 936 So.2d 1111,1135-36 (Fla. 2d DCA 2006); State v. Lebron, 979 So.2d 1093 (Fla. 3d DCA 2008); Jump v. State, 983 So.2d 726 (Fla. 1st DCA 2008). See United States v. Briones, 390 F.3d [610,613-14 (8th Cir. 2004)]; United States v. Stewart, 388 F.3d 1079,1090 (7th Cir. 2004); United States v. Mashburn, 406 F.3d 303,308-09 (4th Cir. 2005); United States v. Naranjo, 426 F.3d 221,231-32 (3rd Cir. 2005); United States v. Williams, 435 F.3d 1148,1157-58 (9th Cir. 2006); see also Cooper v. State, 877 A.2d 1095,1107 (Md. App. 2005); People v. Montgomery, 875 N.E.2d 671,677 (Ill. App. 2007).
>
> The instant case presents such a flagrant violation of the core principles of Seibert that Blaine's post-warning statements are inadmissible whether the Court uses the plurality's test, or Justice Kennedy's test, or a hybrid of the two.
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> Since a police interrogator will rarely directly admit that he or his department deliberately used the question-first technique for the purpose of circumventing Miranda (although here Detective Waldron came pretty close to such an admission during his cross-examination), the appellate courts in Williams, 435 F.2d at 1158, and Montgomery, 875 N.E.2d at 677, stated that "[I]n determining whether the interrogator deliberately

withheld the Miranda warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning." In addition to the officer's testimony concerning his own subjective motivations, courts (in determining the question of deliberate circumvention) may consider some or all of the objective factors outlined in the Seibert plurality opinion, including "(1) the completeness and detail of the prewarning interrogation; (2) the overlapping content of the two rounds of interrogation; (3) the timing and circumstances of both interrogations; (4) the continuity of police personnel; (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first, and (6) whether any curative measures were taken." Williams, 435 F.3d at 1160; Montgomery, 875 N.E.2d at 677; see People v. Angoco, 2007 WL 951496 (Guam 2007)(applying Williams factors to determine whether "question-first" technique was deliberately used to undermine Miranda).

In the instant case, all of the objective factors weigh strongly in the direction of showing deliberate use of the "question-first" technique to circumvent Miranda. In powerful addition is the testimony of Detective Waldron concerning his thought processes and his preparation for the January 9th interrogation session: (1) he believed this would be his last chance to interrogate Blaine before he might ask for a lawyer; (2) he was aware of his department's general order requiring Miranda warnings before engaging in accusatory questioning, and chose not the follow it; (3) prior to the interrogation he had consulted with his supervisors, including the elected sheriff, as to how to proceed; (4) the Sheriff had told him he was counting on him to get closure on this; and (5) the Sheriff and many other officers watched the interrogation on a monitor, and nobody had a problem with what Waldron was doing or saw fit to intervene.

[Blaine Ross initial brief, p.56-58]

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...[B]ecause Detective Waldron's use of the "question-first" technique to procure Blaine's confession was so

> obviously strategic, this is not a case which turns on burden of proof or which Seibert test controls. Neither the plurality nor Justice Kennedy would condone the tactics he used, and none of the potentially curative measures suggested by either the plurality or Justice Kennedy were undertaken. Blaine's post-warning statements, like his pre-warning statements, were inadmissible under either or both of the prevailing Seibert opinions.
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> [Finally, even if Seibert didn't exist or didn't apply, Blaine's post-warning statements would still be inadmissible, because of Detective Waldron's failure to honor his invocation of his right to remain silent [Part G], and because Oregon v. Elstad, 470 U.S. 298,317-18 (1985) does not support the admissibility of post-warning statements when the pre-warning statements were, in addition, the product of coercive interrogation [Part H]].

[Blaine Ross initial brief, p.59-60]

The Florida Supreme Court's opinion shows that the Court agreed with Ross' contention that Detective Waldron's "two-step" interrogation technique failed to meet the minimum constitutional requirements under any standard; Seibert (plurality), Seibert (Justice Kennedy) or Elstad. [While the Florida Supreme Court did not entirely accept Ross' argument regarding his invocation of his right to remain silent after the Miranda warnings were read (A56-57,n.27), the Court did agree with Ross that Detective Waldron used psychologically coercive tactics during the prewarning and postwarning interrogation which (in combination with all of the other circumstances) rendered his eventual waiver of his Miranda rights involuntary, and rendered his postwarning admissions - - prompted by Waldron's reminders of his prewarning admissions - -

unreliable and involuntary under state as well as federal law (A2,17-18,55-56,63-65). The Florida Supreme Court emphasized that even under the Elstad test, a postwarning statement is admissible only "absent deliberately coercive or improper techniques in obtaining the initial statement" (A42, n.11); while in Ross' case the Court found that Waldron (in addition to minimizing the significance of the Miranda warnings) used a variety of psychologically coercive techniques which undermined the reliability of Ross' prewarning and postwarning admissions (A64)].

Two of Petitioner's ancillary points were discussed by the Florida Supreme Court and should be addressed in the Brief in Opposition. First, Pettioner argues that "[i]t would be a stretch...to find that Miranda warnings were withheld in this case until a confession had been obtained, since no confession was obtained prior to the administration of the warnings" (state's petition for certiorari, p. 25). Petitioner claims the Florida Supreme "changed the trigger by reviewing for any 'improper and deliberate tactics in delaying the Miranda warnings'" (cert petition, p. 25).

However, neither the plurality opinion in Seibert nor Justice Kennedy's concurrence require a full prewarning confession followed by a full postwarning confession. Justice Kennedy's test - - which Petitioner insists is the sole controlling standard (cert petition, p. 14) - - states:

> When an interrogator uses this deliberate, two-step strategy, predicated upon violating Miranda during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific curative steps.

Missouri v. Seibert, 542 U.S. at 621 (Kennedy, J., concurring)(emphasis supplied).

The Florida Supreme Court correctly rejected the state's argument. The Court recognized that Detective Waldron obtained inculpatory admissions from Ross during the extended accusatory prewarning interrogation, and then - - reminding Ross of his earlier admissions - - obtained further damaging admissions during the postwarning session (A2,46,55-56,59,62-63).

An argument similar to that made by Petitioner was soundly rejected in Edwards v. United States, 923 A.2d 840 (D.C. 2007):

> As it relates to Justice Kennedy's test, the government makes two arguments that Seibert should not apply to these facts. First, the government maintains that Edwards' prewarning statement was not a confession. The government asserts that Detective Smith, though he initially set out on a two-step inquiry, did not ultimately "deploy the investigatory tactic...to undermine Edwards' Miranda rights in a calculated manner" because he Mirandized Edwards before he actually confessed. Second, while the government does not put it in these specific terms, it argues that Edwards' "masked man" story was not inculpatory and, therefore, was not "related in substance" to the self-defense statement. These arguments are unpersuasive.
>
> While Edwards' masked-man story may not have been a full confession, Edwards did admit that he had a motive to kill the victim (the "beef"), the means to kill the victim (the gun), and the opportunity to kill the victim (he was at the scene). Moreover, Detective Smith admitted that he Mirandized Edwards "because he

> had incriminated himself with the weapon." It is true that the Seibert court termed the statement in its case a confession and that much of the plurality's opinion, therefore, is couched in those terms. The plurality, Justice Breyer, and Justice Kennedy, however, all clarified that the issue was not merely about complete and integrated confessions, but about any statements obtained through a two-step interrogation process. See McCoy [v. United States, 890 A.2d 204, 208 (D.C. 2006)] ("The Supreme Court's recent holding in Missouri v. Seibert...establishes that when police purposefully use a 'question first, Mirandize later' interrogation technique, postwarning statements related to prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.")

923 A.2d at 949-50 (emphasis in opinion).

As recognized in Edwards, "Limiting Seibert to full confessions as the government urges would encourage police to withhold Miranda warnings at the beginning of interrogations and bring the suspect to the brink of confessing. Police could then use the prior admissions, whether inculpatory or purportedly exculpatory, to take the last small step to obtaining the confession." 923 A.2d at 850.

That - - as the Florida Supreme Court found - - is exactly the technique which Detective Waldron deliberately used in the instant case.

Secondly, Petitioner appears to argue, based on the dissenting opinion below, that the Florida Supreme Court did not accord sufficient deference (i.e., absolute and irrebuttable deference) to the findings of the trial court. [See petition for

certiorari, p.10, 21-22]. However, the amount of deference a state's highest court should pay on direct appeal to a state trial court's findings is a matter of state law. [Even in federal habeas corpus cases, "in the event of a conflict between the fact findings of the state trial court and the state appellate court, deference should be given to the version reached by the higher court"; to conclude otherwise would intrude upon important interests in comity and federalism. Washington v. Sobina, 509 F.3d 613,620 (3d Cir. 2007)]. As Ross stated the applicable standard of review in his initial brief:

> A motion to suppress a confession based on the Fifth Amendment and Article I, Section 9 of the Florida Constitution presents a mixed question of law and fact. While the trial court's findings of historical fact are accorded deference if supported by competent, substantial evidence, the application of the law to the facts is reviewed de novo. Cuervo v. State, 967 So.2d 155,160 (Fla. 2007). As the interrogation sessions were audiotaped, and in the case of the January 9th interview, videotaped, this Court can independently review them to assess whether the trial court's factual findings were based on competent, substantial evidence. Cuervo, 967 So.2d at 160. See also Almeida v. State, 737 So.2d 520,524 n.9 (Fla. 1999) and Dooley v. State, 743 So.2d 65,68 (Fla. 4th DCA 1999), recognizing that insofar as a ruling is based on a videotape or audiotape, the trial court is in no better position to evaluate such evidence than the appellate court.

As the Florida Supreme Court correctly observed, the trial court did not make a credibility finding that Detective Waldron's failure to provide Miranda warnings prior to his accusatory interrogation of Ross was inadvertent or that it was a good-faith mis-

take. (See A49-50 and n.21). Instead, the trial court wrongly concluded that "[t]here is no evidence that the detectives deliberately withheld Miranda until Defendant confessed" (A49, n.21) (emphasis supplied), which is more in the nature of a determination of evidentiary sufficiency (which is capable of review on appeal), not a finding of historical fact. Therefore, the Florida Supreme Court was well within its rights to conclude that - - contrary to the trial judge's opinion - - the evidence (including Detective Waldron's own admissions that he believed this would be his last chance to interrogate Ross before he might ask for a lawyer; that he was aware of his Department's general orders that Constitutional Rights warnings are required before questioning passes to an accusatory stage but "in certain circumstances you have to go outside of those guidelines"; and that he discussed how he planned to proceed with his supervisors including the elected Sheriff; as well as his conduct of the videotaped interrogation session itself) overwhelmingly showed that Waldron's decision to withhold Miranda warnings for several hours of intense accusatory questioning (producing multiple incriminating admissions) was deliberate and strategic.

[Even assuming arguendo that the trial judge's opinion could be construed as a factual finding, the Florida Supreme Court is empowered under state law to decide whether such finding was supported by competent, substantial evidence. Cuervo, 967 So.2d at

160. Here, the Court properly concluded that all of the evidence showed the contrary - - that Waldron's withholding of Miranda warnings was deliberate].

Finally, it should be noted that the trial judge relied heavily on United States v. Gonzalez-Lauzan, 437 F.3d 1128 (11th Cir. 2006) (Petitioner's Appendix, A150-152). The circumstances of Gonzalez-Lauzan are the polar opposite of Ross' case; there the federal appellate court expressed doubt as to whether the initial unwarned segment constituted an "interrogation" at all under Rhode Island v. Innis, 446 U.S. 291 (1980), but even assuming arguendo that it did, it clearly did not amount to deliberate use of an interrogation technique designed to undermine Miranda. That is because just before the interview commenced the officers gave Gonzalez-Lauzan an introductory admonition that "we are not asking you any questions. We don't want you to say anything. We just have something to say to you and we ask that you listen to it so that you can understand where we are coming from". The officers then described the evidence they had accumulated against Gonzalez-Lauzan, who mostly sat and listened, though he would occasionally blurt out a comment like, "I'm no mastermind", "I'm not the kingpin", or "I'm not the person." Three times during this portion of the session, the officers repeated that they were not asking questions and Gonzalez-Lauzan should just listen. When Gonzalez-Lauzan suddenly made an unsolicited statement, "Okay, you got me", the

officers immediately advised him of his Miranda rights "without first pursuing any questioning or obtaining any detail." 437 F.3d at 1130-31,1136-38. The officers testified in the suppression hearing that it was their intention from the beginning to give Miranda warnings before asking any questions. 437 F.3d at 1137. In addition, there was no hostility displayed by the police officers during the session.

Under those facts, it is hard to fault the Eleventh Circuit's conclusion that "[b]ecause the officers had yet to ask Gonzalez-Lauzan a single question" before the time they provided Miranda warnings, and because they had repeatedly informed him that he should just listen, there was no circumvention of Miranda and the warnings, when given, were adequate to accomplish their purpose.

The circumstances of Gonzalez-Lauzan and those in Blaine Ross' case are at opposite extremes of the Seibert continuum. There is no reason to grant Florida's petition for certiorari because Detective Waldron's interrogation of Ross involved multiple and ongoing constitutional violations, and the state cannot prevail under any standard which might be applied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully Submitted,

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